No. 47094-2-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF:

JESSUP B. TILLMON,

PETITIONER.

REPLY IN SUPPORT OF PERSONAL RESTRAINT PETITION

Jeffrey E. Ellis #17139
Attorney for Mr. Tillmon

Law Office of Alsept & Ellis, LLC
621 SW Morrison St., Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com
ReneeAlsept@gmail.com

A. INTRODUCTION

Washington courts have drawn a bright line prohibiting prosecutorial misconduct by PowerPoint. *State v. Walker*, __ Wn.2d __, 341 P.3d 976 (2015); *In re Personal Restraint of Glasmann*, 175 Wash.2d 696, 286 P.3d 673 (2012). *See also* https://www.themarshallproject.org/2014/12/23/powerpoint-justice.

Despite the Washington Supreme Court recent exhortation that "it is regrettable that some prosecutors continue to defend these practices and the validity of convictions obtained by using" improper PowerPoint slides, the State asks this Court to obscure, if not erase that line. *Walker,* 341 P.3d at 984. This Court should reject the State's invitation. Instead, this Court should follow the Washington Supreme Court's recognition of the "serious need to curb abuses of such visual presentations." *Id.*

While the State may be correct that this case is not the worst of the reported cases, it still is a case on the side of line where prejudicial and reversible misconduct resides. This Court should reverse.

B. ARGUMENT

1. MR. TILLMON WAS DEPRIVED OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL BY THE PROSECUTOR'S USE OF IMPROPER POWERPOINT SLIDES

2. MR. TILLMON WAS DEPRIVED OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO THE POWERPOINT SLIDE.

Twice recently, the Washington Supreme Court stated:

> We have no difficulty holding the prosecutor's conduct in this case was improper. Closing argument provides an opportunity to draw the jury's attention to the evidence presented, but it does not give a prosecutor the right to present altered versions of admitted evidence to support the State's theory of the case, to present derogatory depictions of the defendant, or to express personal opinions on the defendant's guilt.

Walker, at 985; citing *Glasmann*, 175 Wash.2d at 706–07, 712.

Glasmann held that "the prosecutor's modification of photographs by adding captions was the equivalent of unadmitted evidence," and "a prosecutor must be held to know that it is improper to present evidence that has been deliberately altered in order to influence the jury's deliberations." 175 Wash.2d at 706. See also *State v. Fedoruk,* 184 Wash.App. 866, 339 P.3d 233 (2014). Numerous cases from other jurisdictions are in accord. *State v. Walter*, No. WD 76655, —— S.W.3d ––, ——, —— – ——, 2014 WL 4976913 (Mo.App. W.D.2014) at * 17–18 ("Giving the State the widest possible latitude, there is still no rational justification for the prosecutor's use of the mug shot during closing argument. Showing Walter wearing an inmate uniform with the word 'GUILTY' prominently displayed across his face added nothing to the State's argument. Rather, the only purpose it could have served was to portray Walter in a negative light to the jury. Accordingly, the prosecutor injected incompetent and potentially prejudicial matters into its closing argument by displaying an altered piece of evidence to the jury for the sole

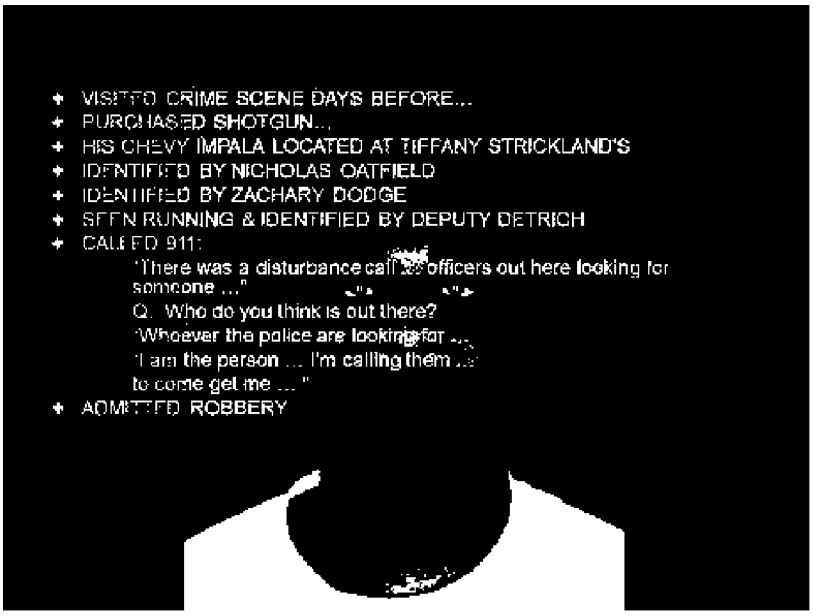
purpose of affecting the jury's opinion of the defendant." (footnote omitted)); *State v. Lazo*, 209 N.J. 9, 19, 34 A.3d 1233 (2012) ("[a]rrest photos raise particular concerns, though, because they can inject prejudice by suggesting a defendant has a prior criminal record;" "an arrest photo may be admitted only if it is presented 'in as neutral a form as possible.' ") (quoting *State v. Taplin*, 230 N.J.Super. 95, 99, 552 A.2d 1015 (App.Div.1988)); *Watters v. State*, 313 P.3d 243, 245, 247 (Nev.2013) ("At trial, the State used a PowerPoint to support its opening statement to the jury. The presentation included a slide showing Watters's booking photo with the word 'GUILTY' written across his battered face." (citing *Glasmann* with approval and holding that this constituted prejudicial error)); *Arca v. State*, 71 Md.App. 102, 105–06, 523 A.2d 1064 (1987) (abuse of discretion to admit mug shots of defendant in a photo array where identity was not in issue); *Smith v. Rhay,* 419 F.2d 160, 164 (9th Cir.1969) ("the introduction into evidence of 'mug shots' for purposes of identification has been held to be highly prejudicial. The Supreme Court of Washington has itself seen prejudicial inferences in the introduction of 'mug shots,' *State v. Devlin*, 145 Wash. 44, 258 P. 826 (1927) ..." (citation omitted)); *Williams v. Commonwealth*, 810 S.W.2d 511, 513 (Ky.1991) (given prejudice posed by use of booking photos at trial, they are inadmissible unless " '(1) the prosecution [had] a demonstrable need to introduce the photographs; (2) the photos themselves, if shown to the jury,

[did] not imply that the defendant had a criminal record; and (3) the manner of their introduction at trial must be such that it [did] not draw particular attention to the source or implications of the photographs.' " (quoting *Redd v. Commonwealth*, 591 S.W.2d 704, 708 (Ky.App.1979)))

Likewise, it is impermissible for the prosecutor to vouch for the credibility of witnesses, or to convey a personal opinion about the defendant's guilt. *Glasmann*, *supra*; *State v. Lindsay*, 180 Wash.2d 423, 432, 437, 326 P.3d 125 (2014).

When the State engages in this type of misconduct, *Walker and Glasmann* conclude the misconduct is so flagrant and prejudicial that it could not have been overcome with a timely objection and an instruction to the jury to disregard the improper slides. *Id.*

The prosecutor employed both types of flagrant against Mr. Tillmon. First, the prosecutor digitally manipulated a photo of Mr. Tillmon and superimposed script, including a red "guilty," on Tillmon's face.



In addition, the prosecutor used a slide featuring booking photographs of the three co-defendants adding the conclusion "partnership in crime," a contested fact in the trial.

While the State is correct that other cases feature a greater number of

improper slides or employed a larger font, these are not distictions recognized by the law. The content of the improper slides in this case is identical to the content of the slides at issue in *Walker* and *Glasmann*. It is the content that matters. This case, along with *Walker* and *Glasmann*, "deal with PowerPoint presentations during closing argument that included altered exhibits, expressions of the prosecutor's opinion on the defendant's guilt, and clear efforts to distract the jury from its proper function as a rational decision-maker." *Walker,* 341 P.3d at 985. This Court should decline the State's invitation to disavow or distinguish *Glasmann* and *Walker*, but instead should instead conclude that the prosecutor's slides were flagrant and prejudicial.

With regard to the laterantive IAC claim, the State argues that *Glasmann* was new law and therefore it was not deficient for counsel to fail to object. Once again, the State's argument is completely undermined by caselaw. In *Walker,* the Supreme Court expressly noted:

> *Glasmann* is certainly not the first case to hold that visual aids must be used only for their proper purpose. Nearly 30 years ago, the Court of Appeals observed that "in order to help the jury more easily understand other evidence, modern visual aids can and should be utilized. A trial judge must, however, be careful to avoid letting the visual aids be used more for their shock value than to educate." *State v. Strandy*, 49 Wash.App. 537, 541–42, 745 P.2d 43 (1987). There is also nothing new about the idea that purported visual aids can cross the line into unadmitted evidence. *E.g., Holland v. United States,* 348 U.S. 121, 127–28, 75 S.Ct. 127, 99 L.Ed. 150 (1954); *Gustin v. Jose*, 11 Wash. 348, 350, 39 P. 687 (1895).

Id. at 986.

3. THE JURY INSTRUCTIONS REQUIRED PROOF WHICH THE STATE DID NOT OFFER.

The State asks this Court to do otherwise. The State asks this Court to read the kidnapping instruction's requirement of proof of a robbery to include any generically defined robbery, rather than the robberies charged and instructed in this case.

Jury instructions must be read as a whole, reading the challenged portions in the context of all the instructions given. *State v. Pirtle,* 127 Wash.2d 628, 656, 904 P.2d 245 (1995), *cert. denied,* 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). Here, that means this Court must read the kidnapping instruction's requirement that the jury find defendant committed a robbery, in light of the "to convict" instructions on robbery.

This Court has already held that there was insufficient proof that the robberies were committed in the manner defined in the instructions. The same result follows here.

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C. CONCLUSION

The law is clear. This Court should reverse and remand for a new trial.

DATED this 15th day of April, 2015.

Respectfully Submitted:

/s/Jeffrey E. Ellis
Jeffrey E. Ellis #17139
Attorney for Mr. Tillmon
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

CERTIFICATE OF SERVICE

I, Jeffrey Ellis certify that on April 15, 2015, I efiled the attached reply brief causing a copy to be emailed to opposing counsel at:

PAOAppeals@co.thurston.wa.us

April 15, 2105//Portland, OR /s/Jeffrey Ellis

ALSEPT & ELLIS LAW OFFICE

April 15, 2015 - 8:21 AM

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